

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD KEITH BROWN, JR.,

Defendant-Appellant.

UNPUBLISHED

January 20, 2011

No. 294501

Ingham Circuit Court

LC No. 08-001197-FC

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Gerald Keith Brown appeals as of right his jury convictions of armed robbery, MCL 750.529, assault with a dangerous weapon, MCL 750.82, discharge of a firearm in or at a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to serve 225 to 600 months in prison for the armed robbery conviction, 24 to 48 months in prison for both the assault with a dangerous weapon and discharge of a firearm in or at a building convictions, and to two years in prison for the felony-firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred when it scored Offense Variable (OV) 7. This Court reviews de novo the proper interpretation of the sentencing guidelines. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). Trial courts must score the variables provided under the statutory scheme. *Id.* at 32. The trial court determines the sentencing variables by reference to the record and making findings under the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). We review the trial court's findings for clear error. *Id.* This Court must uphold a sentence that is within the guidelines range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information. MCL 769.34(10).

Under MCL 777.37, the trial court must score OV 7 for the perpetrator's conduct that amounted to aggravated abuse toward a victim. Specifically, the trial court must score OV 7 at 50 points if a "victim was treated with sadism, torture, or excessive brutality." MCL 777.37(1)(a). However, OV 7 must also be scored at 50 points if the perpetrator engaged in conduct "designed to substantially increase the fear and anxiety" that a "victim suffered during the offense." *Id.*

In this case, defendant pointed a pistol at the victims, ordered them to lie on the floor, pushed their backs to the ground, and took money from the cash register. The victims complied with his demands. As defendant was leaving, he fired the directly over the victims' heads. He also fired more shots outside the store. Defendant did not need to fire the gun; he had already subdued the victims and taken the money from the till. The only purpose for this conduct was to further terrify the victims. Thus, there was clear record evidence to support the trial court's finding and it did not err when it scored 50 points under OV 7.

Defendant next argues he was denied a fair trial because the prosecutor failed to produce the two victims at trial. Previous testimony of a witness is admissible if he or she is "unavailable" during the trial. MRE 804(b)(1). In a criminal case, a witness is "unavailable" if the proponent has been unable to procure his or her attendance and has exercised "due diligence." MRE 804(a)(5) Due diligence encompasses doing everything reasonable, not everything possible, to produce the witness. *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

In this case, the police and the prosecutor did everything they reasonably could to produce the victims. The prosecutor filed a notice that he intended to produce all of the witnesses who were listed on the felony information at trial. The victims were listed on the information. On the morning of the trial, the prosecutor filed a motion to declare the victims unavailable and to admit one victim's preliminary examination testimony. An accompanying written and oral offer of proof set forth the prosecutor's diligent attempts at locating the victims. The victims' absence during the trial was due to their unwillingness to cooperate with the authorities rather than a lack of effort to locate and subpoena them.

Defendant alternatively argues he was denied the effective assistance of counsel because his attorney failed to request a due diligence hearing, failed to request a dismissal of the case, and failed to object to the omission of the missing witness instruction. In order to warrant relief for ineffective assistance of counsel, defendant has to show that his trial counsel's actions fell below an objective standard of reasonableness under prevailing professional norms and that, but for those errors, there is a reasonable probability that the outcome would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

The prosecutor used diligence in attempting to produce both victims, and the evidence presented against defendant was strong. Therefore, neither a due diligence hearing nor a dismissal of the case was called for and would not likely have been granted. Counsel is not ineffective for failing to make a futile motion. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, although the missing witness instruction may have been appropriate in this case, failure to request the instruction was not outcome determinative. The evidence presented against defendant was overwhelming and included a security video of defendant committing the crime, as well as defendant's confession in his initial statement to the police. Accordingly, any error in failing to procure this instruction did not prejudice defendant. *Yost*, 278 Mich App at 387.

Finally, defendant argues the trial court erred in admitting the victim's identification from the preliminary examination because it was impermissibly suggestive. "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). If a witness is exposed to an unduly suggestive pretrial identification procedure, the witness's identification will not be allowed unless the prosecution shows by clear and convincing evidence that the identification "will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). Relevant factors for examining the totality of the circumstances include the witness's opportunity to view the perpetrator at the time of the crime, the witness's degree of attention, the accuracy of a prior description, the witness's level of certainty at the pretrial identification procedure, and the length of time between the crime and confrontation. *Id.* at 304-305.

In this case, even assuming that defendant's identification at the preliminary examination was suggestive, the record establishes that the victim had a sufficient basis to identify defendant independent of his appearance at the preliminary examination. The victim saw defendant enter the store, unmasked, before he put on the mask and committed the offense. The victim was in close proximity to defendant during the entire offense. The record does not indicate that the victim identified anyone else as the perpetrator. Rather, she identified defendant in court less than three weeks after the crime.

Even if the trial court erred by failing to suppress the victim's identification testimony, defendant is not entitled to relief because the suppression of the victim's identification testimony would not have changed the outcome of the trial. Several additional pieces of evidence linked defendant to the crime, including a security tape of him committing the robbery and his confession. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause